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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ELVINA M. HERWEG, by her husband and next friend, Darrell E. Herweg; and DARRELL E. HERWEG, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

ROBERT D. RAY, individually and in his capacity as Governor of the State of Iowa; and KEVIN J. BURNS, individually and in his capacity as Commission of the Iowa Department of Social Services,

Respondents.

On Writ of Certiorari to the United States Court of Appeals For The Eighth Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether Iowa's traditional exercise of its expressly delegated power to enforce administratively spousal financial responsibility in order to target Medicaid assistance for nursing home care to those most in need may be limited by a one month durational restriction contained in a new regulation promulgated by the Secretary of Health and Human Services.

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Respondents.

On Writ of Certiorari to the United States Court of Appeals For The Eighth Circuit

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

The central issue in this case is whether Iowa's traditional exercise of its expressly delegated power to enforce administratively spousal financial responsibility in order to target Medicaid assistance for nursing home care to those most in need may be limited by a one month durational restriction contained in a new regulation promulgated by the Secretary of Health and Human Services.

In 1965, Congress, recognizing the need to encourage states to provide government sponsored medical assistance as a last

resort to needy persons without other means, passed the Medicaid program. Under Medicaid, states are required to develop plans for providing medical care to the needy consistent with federal statutory requirements. State Medicaid plans are forwarded to the Secretary of Health and Human Services for approval, 42 U.S.C. § 1396a(b). While participation in the program is entirely voluntary, states electing to establish Medicaid programs receive substantial federal financial assistance, 42 U.S.C. § 1396b(a)(1).

Under the statutory provisions of the Medicaid program (which are incorporated into the Social Security Act, Title 42, §§ 1396 *et seq.* of the U.S. Code), state plans are to include "reasonable standards . . . for determining the extent of assistance" under the plan. According to the statutory scheme, these standards may:

> . . . provide for taking into account *only such income and resources, as are, as determined in accordance with standards prescribed by the Secretary, available* to the applicant or recipient, 42 U.S.C. § 1396a(a)(17)(B) (emphasis supplied) (hereinafter referred to as Section 17(B).

The statutory framework further limits state authority to take into account financial responsibility of any individual other than the applicant:

> . . . *unless such applicant or recipient is such individual's spouse* or such individual's child who is under the age of 21 . . . 42 U.S.C. § 1396a(a)(17)(D) (emphasis supplied) (hereinafter referred to as Section 17(D).

The clear import of these Medicaid provisions is that Congress intended to give the states authority to include in their Medicaid plans reasonable standards that allow consideration of the income and resources of an applicant's spouse, provided that the state standards are in turn consistent with standards prescribed by the Secretary.

These statutory directives are drawn into focus when one spouse, institutionalized in a nursing home, applies for Medicaid benefits. The question arises whether and to what extent the income and resources of the noninstitutionalized spouse should be considered available to pay for the cost of nursing home care of the applicant. If some income may be "deemed" available, the state may subtract that amount from the payment it would otherwise make to the vendor of nursing home services under Medicaid.

Over the years, Iowa has exercised the express authority vested in it by Congress in Section 17 by including in its state plan a standard that provided that the income and resources of a noninstitutionalized spouse should be taken into consideration when an applicant spouse is institutionalized. Responsible state officials believed that under local community notions of the nature of marriage obligations prevailing in Iowa, it was reasonable to expect noninstitutionalized spouses to contribute to the cost of care of an institutionalized spouse. Under Iowa's Medicaid standard, Medicaid assistance could be reduced, or even eliminated, depending upon the income and resources of the noninstitutionalized spouse. A generalized formula was used to determine the amount of income of the noninstitutionalized spouse which would be considered available to the institutionalized spouse.[1]

As of 1975, the Secretary's regulation promulgated pursuant to Section 17(B) simply stated "that only such income and resources as are actually available will be considered and that income and resources will be reasonably evaluated," 45 C.F.R. §

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[1] Iowa's formula for computing available income has been frequently amended. The most recent general policy is contained in Social Services Manual Letter No. XII, 1-28 (Part Two), June 3, 1977. *See* Joint Appendix, p. 36. The general policy allowed income of the noninstitutionalized spouse to be deemed available after exclusions for the living expenses of the spouse, for dependent children living at home, for medical expenses, and for earned income.

248.3(b)(1975). The regulation contained no time restriction on state authority to consider spousal financial responsibility.

In December of 1975, however, a decade after Medicaid was established, the Secretary issued a notice of intended action in the Federal Register, 40 Fed. Reg. 60074 (Dec. 31, 1975). In that notice, the Secretary announced the intention of drastically modifying HHS's established approach to Medicaid spousal financial responsibility. Under the proposed regulation, a state plan could generally consider the income and resources of a noninstitutionalized spouse for only one month after separation (six months if the noninstitutionalized spouse is also Medicaid eligible) if the state involved is a so-called SSI state (one in which Medicaid assistance is available to those who qualify for federal Supplemental Security Income benefits). The Secretary apparently belatedly came to the conclusion that this time window was dictated by the Supplemental Security Income amendments to the Social Security Act which were passed more than three years before the notice of intended action.

After the passage of more than two years after the notice, the Secretary in 1977 promulgated the regulation in final form, 42 Fed. Reg. 2684 *et seq.* (Jan. 13, 1977). It states, in relevant part:

> If only one spouse in a couple applies or is eligible and they cease to live together, the agency must consider only the income and resources of the ineligible spouse that are actually contributed to the eligible spouse after the month in which they cease to live together. 42 C.F.R. 435.723(d).

This regulation purports to prevent SSI states from considering the income and resources of a noninstitutionalized spouse beyond one month after separation even if the noninstitutionalized spouse is an extremely wealthy individual.

As an SSI state, Iowa's traditional spousal responsibility policy admittedly did not comport with the Secretary's new regulation because it considered income and resources of a noninstitutionalized spouse beyond the one month limitation in

the regulation. The Iowa General Assembly, determined to maintain the general concept that financially able spouses should be expected to contribute to the cost of institutionalized care before Medicaid payments are made, passed an Act in 1977 which urged the Iowa Department of Social Services to resist federal regulations which "would allow spouse income under certain circumstances to be excluded from the determination of income for intermediate care facility Medicaid eligibility purposes." See H.F. 464, 1977 Iowa Acts, 67th G.A., § 18 (J.A. 48). Director of Social Services Kevin Burns shortly thereafter wrote regional federal officials in Kansas City outlining Iowa's strong opposition to the new federal policy. Among other things, Burns expressed the view that the new federal policy "exceeds the authority provided by the Social Security Act for such regulatory action." (J.A. 52).

Iowa, believing its position most consistent with the Medicaid program and legally defensible, continued to apply its traditional spousal responsibility policy not limited by the time window in the Secretary's regulation. In 1978, the petitioners filed an action in district court challenging Iowa's policy on statutory and constitutional grounds. The parties stipulated (J.A. 76) that the appellants properly represented a class (J.A. 22) consisting of all married couples residing in Iowa in which:

(a) one spouse is eligible for Medicaid and requires institutionalization;

(b) the other spouse is not institutionalized;

(c) the noninstitutionalized spouse has income which is deemed available to the institutionalized spouse.

The petitioners offered four theories attacking Iowa's traditional responsibility policy. First, petitioners contended that Iowa's policy violated the applicable federal regulations. Second, petitioners argued that Iowa's policy violated Section 17 of the Social Security Act. Third, petitioners charged that by

using an "arbitrary formula" to determine the amount of income on the noninsitutionalized spouse, Iowa's policy violated constitutional due process. Finally, the petitioners pleaded that Iowa's policy created two classes of persons, the married and the unmarried, and that the creation of these classes "without sufficient justification" offended equal protection. (J.A. 29-32).[3]

The district court did not directly rule on the constitutional issues. It did hold, however, that Iowa could consider income and resources of a noninstitutionalized spouse provided that the state make an individualized determination of the financial needs of the noninstitutionalized spouse rather than apply a generally applicable formula for determining how much the spouse should be expected to contribute. While the district court did not expressly invalidate the Secretary's new spousal responsibility regulation, the court, by upholding Iowa's authority to apply its spousal responsibility policy in a non time restricted manner, impliedly found the Secretary's regulation unlawful and without effect. See *Herweg* v. *Ray*, 481 F.Supp. 914, 917 (S.D. Iowa 1978).

As a result of the ruling, Iowa reluctantly, but in full compliance with the court's order, altered its spousal responsiblility policy to provide for an individualized determination of the needs of the noninstitutionalized spouse. This new policy was "specifically approved" by the district court in a clarifying order mutually sought by the parties. *Herweg, supra,* 418 F.Supp. at 917.

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[3] The Amicus Brief submitted on behalf of the Grey Panthers suggests that Iowa's policy somehow violates the comparability provisions of the Medicaid act, 42 U.S.C. § 1396a(a)(10), (13), (17). This issue was not litigated below. In any case, Respondents believe that its spousal financial responsibility policy is in full compliance with comparability provisions since it applies to all institutionalized spouses regardless of the SSI category under which they qualify for assistance.

The petitioners appealed to the Eighth Circuit. There, the thrust of their main argument was that "available" income and resources under Section 17(B) included only income that was "actually contributed" by the noninstitutionalized spouse. The petitioners attacked not only the policy of the State of Iowa on this ground, but also the new time restricted financial responsibility regulation promulgated by the Secretary of HHS in 1977. By pressing the claim that only funds "actually contributed" may be considered in making Medicaid determinations, petitioner's argument was strikingly similar to that rejected by this court in *Schweiker* v. *Grey Panthers,* ____ U.S. ____, 101 S.Ct. 2633 (1981). The Eighth Circuit, sitting *en banc,* affirmed the judgment below by an equally divided court, *Herweg* v. *Ray,* 619 F.2d 1265 (8th Cir. 1980).

The two opinions offered by the Eighth Circuit are a study in contrast. Judge Ross wrote that "available" income and resources did not mean income "actually contributed" to the cost of care of the institutionalized spouse. He rested his opinion on the express language of Section 17 of the Social Security Act, which appears to give the states considerable leeway in the crafting of their Medicaid plans, and on the applicable legislative history. Judge Ross rejected the time restricted approach of HHS as inconsistent with the true meaning and intent of Section 17 of the Social Security Act, see *Herweg, supra,* 612 F.2d at 1272-3.

Judge McMillian, on the other hand, believed that whatever the law might have been prior to 1972, the enactment of the Supplemental Security Income Program (SSI) in 1972 significantly altered the legal landscape in the spousal responsibility area. Judge McMillian intricately detailed what he saw as the interrelationship between Medicaid and the SSI program. He observed that prior to the passage of SSI, eligibility for Medicaid was "linked" to eligibility for federal categorical assistance programs. When Congress passed the SSI program, it gave the states the choice of continuing to determine Medicaid

eligibility according to standards then in existence in 1972, or according to the liberalized SSI eligibility requirements. Iowa, Judge McMillian observed, elected to apply the more liberal SSI requirements. Judge McMillian believed that the SSI statute mandated that spousal responsibility be strictly limited to the one and six month time limits embraced by the Secretary's challenged Medicaid regulation. He further reasoned that the method by which a state calculated and enforced its spousal responsibility policy was tantamount to an eligibility requirement. Judge McMillian thus concluded that since Iowa had adopted SSI eligibility standards and SSI has restrictive provisions similar to that embraced in the Secretary's regulation, Iowa's contrary policy must be invalid, *Herweg, supra,* 612 F.2d at 1285-86, 1292.

Petitioners filed for writ of certiorari with this Court. They stated in their petition for certiorari that the question presented was "Whether the Court of Appeals' invalidation of a regulation promulgated by the Department of Health and Human Services which was designed to ensure that, in so-called "SSI states,' Medicaid applicants and recipients would have the eligibility conditions and rules of the Supplemental Security Income ("SSI") program applied to them was appropriate in light of the explicit requirements of the Medicaid and SSI Statutes and the deference due the responsible federal agency."[3]

This Court granted the writ on July 2, 1981.

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[3] Petitioners-Appellants' Brief at 2. Petitioners' decision to support the HHS regulation it attacked in the Court of Appeals below may have been influenced by this Court's decision in *Schweiker* v. *Grey Panthers,* ___ U.S. ___, 101 S.Ct. 2633 (1980).

SUMMARY OF ARGUMENT

1. A federal regulation that attempts to impose a narrow time window on state authority to consider financial responsibility of spouses as expressly authorized in Section 17(D) of the Social Security Act exceeds the Secretary's statutory authority. The time restricted approach is a refusal to promulgate standards of income and resource availability as required by Congress in Section 17(B) of the Act. The legislative history and language of the Medicaid program evince no intent to cut off state authority to consider the financial responsibility of spouses when spouses are not living together due to institutionalization.

2. The so-called "link" between SSI and Medicaid does not support the validity of the Secretary's time limitation. Congress has delegated to the states a more substantial policy role in Medicaid than in the Supplemental Security Income program. Nothing in the express terms of the Supplemental Security Income Act precludes states from considering the financial responsibility of spouses in determining the amount of Medicaid assistance. The SSI requirement that states provide "for making medical assistance available" to SSI recipients is not inconsistent with financial responsibility provisions of Medicaid. All that is required is that medical care be available from some combination of sources that can include government assistance or expected spousal contribution. Nothing in the so-called deeming provisions of the Supplemental Security Act requires restricted Medicaid deeming. By insisting on exercising its expressly delegated statutory power to require reasonable spousal financial responsibility, Iowa does not evade a Congressionally prescribed "choice" between accepting expanded SSI coverage or limiting benefits pursuant to the so-called 209(b) option.

3. The Congressional delegation of power to the states to develop spousal financial responsibility policies, consistent with

valid standards promulgated by the Secretary, rests on sound policy grounds. Reasonable policies of spousal responsibility help states target their Medicaid dollars to those most in need and promotes perceptions of program fairness. Reliance on state responsibility laws is not a meaningful alternative because of the extreme burdens placed on welfare administrators by such a policy.

ARGUMENT

Iowa's present spousal financial responsibility policy is admittedly inconsistent with the new federal regulations. The State allows financial responsibility of spouses to be considered beyond the one month time frame in 42 C.F.R. 435.723(d). At present, each individual is entitled to a determination in which the financial needs of the noninstitutionalized family member are evaluated so that the expectations of support placed upon them are not unreasonable.[4] Given the inconsistency with the federal regulation, Iowa's policy must fall under the Supremacy Clause if the Secretary's regulation is a valid exercise of federal power under Section 17(B) of the Social Security Act, 42 U.S.C. § 1396a(a)(17)(B).

The standard of review of Medicaid regulations promulgated pursuant to 42 U.S.C. § 1369a(a)(17)(B) was discussed in *Schweiker* v. *Grey Panthers*, ____ U.S. ____, 101 S.Ct. 2633 (1981). In that case, the Court made a general observation that the Secretary's definition of the term "available" is entitled to legislative effect. It was observed, however, that the Court must also review regulations to ensure that the Secretary did not "exceed his statutory authority" and that the regulations are not "arbitrary or capricious," 101 S.Ct. at 2640. See also 5 U.S.C. §§ 706(2)A, C. Where the Secretary acts outside the scope of his

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[4] Iowa contends that its present case-by-case policy is not required in light of *Schweiker* v. *Grey Panthers*, ____ U.S. ____. 101 S.Ct. 2633 (1980). That case upheld the application of a a general formula in determining amount of resources "available" to a Medicaid applicant in states exercising the so-called § 209B option. Earlier case law to the contrary is no longer authoritative.

Iowa's experience has not been satisfactory with respect to its present policy. Administrative costs seem to have exceeded the gains of the case by case policy. If Iowa is successful in this litigation, it will give serious consideration to adoption of a reasonable, generally applicable formula for determining spousal financial responsibility of a type sanctioned in *Grey Panthers, supra*, n. 2.

congressionally delegated power, the regulations are not entitled to "legislative effect." When the Secretary acts *ultra vires*, it is the duty of this Court to enforce the statutory mandate of the Congress.

I. A Federal Regulation That Attempts To Impose A Narrow Time Window On State Authority To Consider Financial Responsibility Of Spouses As Expressly Authorized In Section 17(D) Of The Social Security Act Exceeds The Secretary's Statutory Authority.[5]

A. The Secretary's Regulation Attempting To Virtually Eliminate Medicaid Financial Responsibility Of Spouses Separated Due To Institutionalization Is A Refusal To Promulgate Standards As Required By Congress In Section 17(B) Of The Social Security Act.

As indicated above, Section 17(B) allows the states in their Medicaid plans to "provide for taking into account only such income and resources as are, as determined in accordance with

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[5] Petitioners appear to believe that the question of whether the Secretary exceeded her statutory authority was not raised below. Petitioner's Brief at 50, n. 18. This is not correct. While it is true that the phrase "exceeded her statutory authority" does not appear in Respondents' Brief in the Court of Appeals, it is observed that until Congress passes additional legislation, the regulation in question is unlawful. Respondents' Brief at 2. And, respondents stated that federal regulations may not forbid the state from taking into consideration the financial responsibility of an individual dealing with a spouse. Respondents' Brief at 18. The question of whether the Secretary's present regulation was defensible, however, was not the focus of the litigation since the Petitioners, at least in the Court of Appeals, attacked rather than defended the Secretary's regulation. The conflict in the Court of Appeals thus became whether the term "available" in Section 17(B) meant "actually contributed".

If any change has occurred, it is the position of the petitioners. They now in this court seek to defend a regulation of the Secretary which they attacked in the Eighth Circuit.

standards prescribed by the Secretary, available to the applicant or recipient," 42 U.S.C. § 1396a(a)(17)(B), [Emphasis added]. But the Secretary in the instant case has not promulgated "standards" of availability entitled to legislative effect as suggested in the language in *Grey Panthers, supra,* ____ U.S. ____, 101 S.Ct. at 2540. Rather, the Secretary has promulgated an exceedingly stringent time limitation totally absent from the Medicaid statute.[6] Instead of following the Congressional directive to enact standards for the states to follow if they wish to consider the financial responsibility of spouses under the cooperative federalism scheme,[7] the Secretary, without statutory foundation, has simply eliminated off state 17(D) authority except for the very brief one month period.

The scope of the Secretary's authority to establish standards of availability is not particularly difficult to discern. For instance, courts use the term "standard of review" to denote the level of judicial scrutiny to be applied to a specific action generally governmental in nature. Standards of review are sometimes lax, sometimes stringent. But, pursuing the analogy, the cut-off adopted by the Secretary is tantamount to a withdrawal of jurisdiction with no standard of review.[8] It is em-

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[6] Petitioners opines that "Iowa's procedures have no time limits and are applied indefinitely." Petitioners' Brief, p. 55, n. 20. In this respect, Iowa's policy follows the statute, which, unlike the Secretary's regulations, also has no time limits.

[7] As stated in *Norman* v. *St. Clair,* 610 F.2d 1228, 1230 (5th Cir. 1980), *cert. denied sub nom., Schweiker* v. *Norman,* ____ U.S. ____, 101 S.Ct. 3159 (1981), under the plain language of the statute, the states were left to establish and prosecute the responsibility of spouses as a matter of their own discretion. While they might prefer to do this through available statutory and judicial techniquest of forcing one spouse to assume the financial needs of the other, in the context of the Medicaid program they are just as free to do so by regulation.

[8] Consider also the common term "standard of living". A person's standard of living can be high, and it can be low. But there must be some standard, unless death occurs.

phatically not the kind of linedrawing entitled to legislative effect, *Grey Panthers, supra.*

A useful analogy may be found in the Aid to Families with Dependent children cases involving the scope of state authority to establish a "standard of need" in determining who is eligible for public assistance. As this court noted in *Rosado* v. *Wyman,* 397 U.S. 397, 408 (1970), a "standard of need" is "a yardstick for measuring who is eligible for public assistance." In establishing the yardstick, the responsible decisionmaker has "a great deal of discretion". The "standard of need" may or may not include specific items in its calculation. Diversity may exist as to the level of benefits that result. For instance, a standard of need may include a ceiling on the maximum dollars allowable. But, as can readily be seen, *some* yardstick of measurement must be present.

A good example of a specific yardstick, or "standard of need" is contained in the Appendix to this Court's opinion in *Dandridge* v. *Williams,* 397 U.S. 488, 504 (1970). The Appendix presents a matrix used by Maryland authorities in determining the "standard of need" for AFDC applicants. The vertical variable describes the number of persons living in the assistance unit, while the horizontal column presents monthly standards of subsistence needs depending on living circumstances of the applicant.

The matrix in *Dandridge* presents the kind of standard that the Secretary of HHS is required to establish under Section 17(B) of the Act. The Secretary, for instance, may establish an amount of income and resources that must be set aside for the living needs of a noninstitutionalized spouse — in other words, an amount exempt from any state deeming plan. Under such a standard, no income or resources could be deemed available unless the noninstitutionalized spouse had wherewithal that exceeded that amount. The Secretary, in the exercise of sound discretion, can introduce a host of relevant variables that in-

crease or decrease the amount that states could deem available for the cost of care of the institutionalized spouse. But again, at the risk of repetition, *some* yardstick must be available to guide states in the exercise of their expressly delegated authority to provide for spousal financial responsibility under Section 17(B) and (D) of the Act.

The inadequacy of a time restrictive regulation under Section 17(B) is shown by the fact that spousal responsibility does not generally vary over time. Alimony obligations, for instance, can generally be altered after a judgment of divorce only if the comparative financial circumstances of the spouses involved materially change over time. Indeed, in Iowa spousal support has been held to be a continuing obligation, *In re Bagnall's Guardianship,* 29 N.W.2d 597, 614 (Iowa 1947); See § 252A.3, Code of Iowa (1981)

The responsibility of a noninstitutionalized spouse to an institutionalized spouse similarly remains constant, regardless of the length of institutionalization. The Secretary's time restricted approach to financial responsibility is not rationally related to any effectuation of objectives underlying the Medicaid Act. It can hardly be said, for instance, that a one month window allows the states to vindicate their expressly delegated power reasonably to require a spousal financial responsibility in their Medicaid programs, Section 17(D).

The legislative intent behind vesting the Secretary with authority to promulgate *standards* for determining availability of income is not too obscure. As noted in *Norman* v. *St. Clair,* 610 F.2d 1228, 1240 (1980), the enactment of Medicaid was an effort to replace the then existing Kerr-Mills medical assistance program for the aged with an expanded and more effective form of federally assisted state aid to needy individuals. Under the previous Kerr-Mills plans, many states had imposed rigid and complex eligibility standards. At the same time, Congress wish-

ed to leave to the states substantial discretion in operating their programs. The tension between these competing principles is reflected in Sections 17(B) and (D). While Congress in passing Medicaid wished to allow states to continue to have considerable flexibility in the spousal financial responsibility, a mild restraint was included in 17(B). By allowing the Secretary to promulgate general standards of income availability, state discretion could be limited so that the most extreme and perhaps irrational methods of calculating income availability could be avoided.

It is unlikely that Congress would further intrude on state authority to structure spousal financial responsibility without more express action. As this Court has noted, domestic relations has long been regarded as a virtually exclusive province of the states. See *Sosna* v. *Iowa,* 419 U.S. 393, 404 (1970). Congress has also been reluctant to tamper with the state authority in the area. It has not passed, for instance, laws federalizing divorce or substantially describing the incidents of the marriage relationship, but has left such matters to the states. Sections 17(B) and (D) seem to respect that traditional relationship in the context of a federal benefit program.[9]

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[9] Traditionally, welfare programs have looked to responsible family members *first,* before loosening the strings of the public purse. As has been noted by a respected authority, the common law originally had no occassion to concern itself with the duties of support between spouses because of the celebrated doctrine that husband and wife were one in the eyes of the law. Statutory provisions relating to husband and wife evolved in the 19th century. Then, "this family responsibility was primary, i.e. in case of destitution the appropriate family members had to be called upon first. . . ." *See* Riesenfield, *The Formative Era of American Public Assistance Law,* 43 Calif. L. Rev. 176, 199 (1955).

Even unsympathetic commentators have noted that relatives under poor law provisions have been called upon to support family members *before* public aid is given. *See* L. Tully, *Family Responsibility Laws: An Unwise and Unconstitutional Imposition,* 5 Fam. L. J. 32, 32 (1971) ("before public aid is given, or in the case of emergency as soon

In sum, by refusing to establish the parameters of proper state action and instead substituting an irrelevant and deeply intrusive time restriction, the Secretary has exceeded his authority by unlawfully invading the permissible ground of state authority established by Congress under Sections 17(B) and (D).

B. The Legislative History And Language Of Medicaid Evince No Congressional Intent To Cut Off State Authority To Consider Financial Responsibility Of Spouses When Separation Occurs As A Result Of Institutionalization.

As much emphasized by the Petitioners, Congress was "aware of imputing the income of others to a Medicaid applicant." *Grey Panthers*, ___ U.S. ___, 101 S.Ct. at 2642. Nevertheless, it included in the Medicaid statute a specific provision allowing states to consider the income of spouses and parents. Congress apparently believed that these individuals were close enough in consanguinity that states could reasonably require them to contribute to the cost of care of their family.

The legislative history of Medicaid demonstrates that Congress believed it was proper for the states, if they chose, to consider financial responsibility of parents and spouses. As this court already noted, the Senate and House reports endorse this approach. See *Grey Panthers*, ___ U.S. ___, 101 S.Ct. at 2640. In the words of the Senate Report:

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as possible after such aid is given, the relatives shall be called upon [to give aid].") *See also J. ten Broeck, California's Dual System of Family Law: Its Origins, Development, and Present Status*, 17 Stan. L. Rev. 614, 624 (1965)

Upholding the principle of primary family support does not on its face seem to compel administrative enforcement, i.e. limiting welfare checks when responsible family members are present *prior* to resort to judicial enforcement of family responsibility. However, administrative enforcement, as this Court has recognized, is the only practical alternative. *See* discussion under Part III *infra*.

> The Committee believes *it is proper to expect spouses to support each other* and parents to be held accountable for the support of their minor children and their blind or permanently and totally disabled children (emphasis supplied). S.Rep. No. 404, 89th Cong., 1st, 78 (1965); *accord* H.R. Rep. No. 213, 89th Cong., 1st Sess., 68 (1965).

There is simply nothing in the legislative history that suggests that the expectation that spouses and parents may be held responsible for the support of their fellow spouse or minor children is eviscerated when they are no longer living together because of institutionalization.

If anything, the above-cited Senate Report seems to assume that at last parents will continue to be financially responsible for their children who are institutionalized. The Senate Report states that it is "proper" to expect parents "to be held accountable" for the support of children "permanently and totally disabled." Permanently and totally disabled children are very likely to be institutionalized.

Linguistic analysis of other provisions of the Social Security Act reinforces the view that spousal financial responsibility under State Medicaid Plans is not affected by separation. While Section 17(D), which expressly allows states to consider financial responsibility of spouses and parents, contains no limitation with respect to living circumstances, other welfare provisions do contain express restrictions. For instance, at least two provisions relating to Supplemental Security Income benefits expressly are applicable only if spouses live together presently or recently. Specifically:

> For the purposes of this subchapter, the term "eligible spouse" means an aged, blind, or disabled individual who is the husband or wife of another aged, blind, or disabled individual, *and who has not been living apart* from such other aged, blind, or disabled individual *for more than six months,* 42 U.S.C. § 1382c(b) (emphasis supplied).

And, similarly:

> For purpose of determining eligibility for and the amount of benefits for any individual who is married and whose spouse *is living with him* in the same household but is not an eligible spouse, such individual's income and resources shall be deemed to include any income and resources of such spouse, whether or not available to such individual, except to the extent determined by the Secretary to be inequitable under the circumstances, 42 U.S.C. § 1382c(f)(1) (emphasis supplied)

From these provisions, it is obvious that Congress knows full well how to express itself in a fashion which limits the application of a principle to circumstances when spouses live together or have been separated for a specific period of time. No such limitation may be found in Section 17(D). Respondents contend that the Secretary cannot, through regulation, limit the statutory delegation to the states contained in that section[10] without express Congressional authority.

II. The So-Called Link Between SSI And Medicaid Does Not Support The Validity Of The Secretary's Time Limitation.

Much is made by Petitioners of the historical "link" between Medicaid and the Supplemental Security Income schemes. It is said that the SSI statute *requires* that all SSI recipients also *receive* Medicaid assistance without regard to spousal financial responsibility. Specifically, it is claimed that the regulation in question here embraces a "goal of limiting deeming to the same extent that is required in the SSI program."[11] And, it is further claimed that states who wish to restrict their Medicaid financial

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[10] Iowa concedes that Section 17(D) does not *require* interspousal income attribution. *See Herweg* v. *Ray*, 619 F.2d 1265, 1280 (8th Cir. 1980). However, Iowa contends that the statute expressly delegated the *choice* to the states.

[11] *See* Petitioners' Brief at 42.

burdens may become so-called 209b states if they wish.[12] Neither of these contentions, however, form the basis for rewriting Section 17(B) and (D) of the Medicaid program.

A. Congress Has Delegated The States A Far Greater Policy Role In Medicaid Than In The Supplement Security Income Program.

In order to analyze properly the Congressionally intended relationship between the Supplemental Security Income program and Medicaid, it is important to understand the philosophical differences in Congress' approach to the two programs.

SSI is "a national program to provide supplemental security income to individuals who have attained age 65 or are blind or disabled . . .", 42 U.S.C. § 1381. The Program is administered entirely by the federal government, and all the funds come from federal sources. The House Report accompanying the bill creating the SSI program heralds the replacement of "existing Federal-State programs of aid to the aged blind, and permanently and totally disabled" with "a new, totally Federal program." See H. R. Rep. No. 92-231, 92nd Cong., 2nd Sess. (1972) *as reprinted in* 1972 U.S. Code Cong. and Admin. News at 5012.

This centralized federal approach stands in stark contrast with Medicaid. The preamble of Title XIX, which establishes the Medicaid program, states that it was enacted "for the purpose of enabling each state, as far as practical under the conditions in each state," to provide needed medical assistance to its population, 42 U.S.C. § 1396. States are not required to institute a Medicaid program, but if they do, they must develop an elaborate plan for providing medical assistance consistent with federal guidelines, 42 U.S.C. § 1396a. In addition, states

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[12] *Id.*, at 52.

must pay up to 40% of the cost of Medicaid payments, 42 U.S.C. § 1396.[13]

This Court has expressly recognized the state's major role in the Medicaid program. As was stated by this Court in *Beal* v. *Doe,* 432 U.S. 438, 444 (1977), the Medicaid program "confers broad discretion on the States to adopt standards for determining the extent of assistance, requiring only that such standards be 'reasonable' and 'consistent' with the objectives of the Act".

Given the broader responsibilities of the states in fashioning the Medicaid program, and given the expenditure of state dollars that occurs, it seems reasonable the Congress would have intended to provide the states with greater leeway in considering financial responsibility of spouses and parents. It is in large part *their program,* involving *their dollars.*[14]

A Congressional intent to give states breathing room is manifest in Section 17 of the Social Security Act, the key statutory provision in this case. At the risk of repetition, in Section 17, Congress authorized the states to develop Medicaid plans that "include reasonable standards" that:

> (B) provide *for taking into account* only such *income and resources* as are, as determined in accordance with standards prescribed by the secretary, available *to the applicant or recipient* [emphasis supplied] . . . .

And,

> (D) do not take into account the financial responsibility of any individual for any application or recipient of

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[13] *See Friedman* v. *Berger,* 547 F.2d 724, 730 (2nd Cir. 1976) *cert. denied,* 430 U.S. 987 (1977), noting funding difference between Medicaid and SSI.

[14] The wide discretion allowed states under Medicaid has been generally achowledged by the courts. *See Norman* v. *St. Clair, supra,* n. 3, at 1228.

> assistance under the plan *unless such applicant or recipient is such individual's spouse,* or such individual's child who is under the age of 21 [emphasis supplied] . . .

B. Nothing In The Express Terms Of The Supplemental Security Income Act Precludes States From Considering The Financial Responsibility Of Spouses In Determining Whether Medicaid Assistance Is Offered.

Petitioners make the rather sweeping claim that if a person is receiving Supplemental Security Income benefits in an SSI state, they must automatically, in all cases, receive Medicaid benefits, regardless of the financial responsibility of spouses and parents.[11] Authority for this overbroad proposition is said to be rooted in 42 U.S.C. § 1396a(a)(10) which requires state Medicaid plans to provide:

> . . . for making medical assistance *available* to all individuals receiving aid or assistance . . . with respect to whom supplemental security income benefits are paid . . . [emphasis added].

Petitioners appear to argue that this provision requires that all SSI "eligibility" criteria in SSI states superceded the express delegations of authority to the states contained in 17(B) and (D). Operating from this premise, Petitioners then claim that SSI generally limits consideration of financial responsibility of spouses to one month.

1. The SSI Requirement That States Provide "For Making Medical Assistance Available" to SSI Benefit Recipients Is Not Inconsistent With Financial Responsibility Provisions Of Medicaid.

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[11] *See* Petitioners' Brief at 56.

For states which, like Iowa, have elected to be so-called SSI states, 42 U.S.C. § 1396a(a)(10) is applicable. But that provision simply requires that state Medicaid plans provide "for making medical assistance *available*" to individuals receiving SSI benefits. It does not mean that financial responsibility of spouses may not be considered in determining whether or not medical assistance is available. It simply means that for every person receiving SSI assistance, the state plan must show that there is some method for insuring the *availability* of medical care.[16] The source of the funds—whether from Medicaid or from a financially responsible spouse is irrelevant. What is required is that for everyone receiving SSI benefits, the state in its Medicaid plan make some reasonable provision to insure the availability of care to the individual.

Iowa's present policy complies with this statutory mandate. State officials make a determination of the extent to which a spouse or parent can reasonably be expected to contribute to the cost of medical care of the fellow or spouse.[17] Iowa's plan approach thus insures the availability of medical assistance, 42 U.S.C. § 1396a(a)(10) while at the same time giving full effect to

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[16] It is interesting to note that in *Grey Panthers, supra,* n. 3, the Court upheld an approach in which the term "available" did not mean "actually contributed". Similarly, in the context of 42 U.S.C. § 1396(a)(10), the requirement t medical services be "available" under a state Medicaid plan does not mean that the state must actually contribute the funds necessary to pay for the care. Rather, the funds must be available from some combination of sources in the applicant's Medicaid environment.

[17] Iowa's present policy is stated in 770 Iowa Administrative Code §75.4(1)(1981), which states:

> **770-75.5(249A) Computation of countable income and resources for persons in a medical institution.** All income and resources available to an applicant or recipient in a medical institution shall be considered in determining eligibility and financial participation by the resident.

Sections 17(B) and (D) of the Medicaid Act. Respondents submit that its approach harmonizes the statutory provisions involved in the present case far better than the mechanical approach offered by Petitioners.

Put somewhat differently, 42 U.S.C. § 1396a(a)(10) simply means that all recipients of SSI assistance must be *eligible* to receive Medicaid benefits. SSI beneficiaries thus may apply for Medicaid assistance without summary rejection. The second stage in the process, however, is determining the level of state financial participation that must be provided to the applicant to insure the availability of medical assistance of the type and ex-

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75.5(1) The income of the ineligible spouse shall be considered available to the resident in determining eligibility and financial participation. Income shall mean gross income less deductions for social security, federal and state taxes, and other mandatory deductions.

75.5(2)* From the combined income of the resident and ineligible spouse the ineligible spouse may keep funds for the payment of reasonable expenses, subject to verification, which are necessary to maintain the ineligible spouse and dependent children customary standard of living. Payment of old debts is an unreasonable expense that shall be allowed only when the payment is a regular installment payment made pursuant to a legally enforceable contract signed prior to the application for assistance and is a debt upon which the family has been making regular payments.

75.5(3) Resources of the ineligible spouse shall be considered available to the resident in determining eligibility. Exempt and nonexempt resources will be determined in accordance with supplemental security income regulations.

The reasonability of this rule has not been questioned in the litigation. If it is successful in this litigation, however, Iowa may choose to implement a general formula for determining the amount of income available to the institutionalized spouse as expressly sanctioned by this Court in *Grey Panthers, supra.* n. 3.

tent comtemplated under Medicaid.[18] One of the permissible elements in determining the level of state assistance needed to insure the availability of medical care is the financial responsibility of the spouse, limited by proper standards promulgated by the secretary pursuant to Section 17(B).[19]

The above approach is thus entirely consistent with the purpose behind 42 U.S.C. § 1396a(a)(10). This provision was not designed to override state authority to consider financial responsibility of family members in the determination of the level of Medicaid benefits required to insure the availability of medical assistance. Rather, this provision appears crafted to insure that medical assistance is available to *categories* of persons defined as in need of assistance under SSI.[20] In other words, the federal definition of "disabled" or "blind" or "aged" or the income and resources eligibility level would be controlling. Thus, in an SSI state, if the federal government chose to expand

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[18] The difference between eligibility and extent of assistance is recognized in 42 U.S.C. § 1396a(a)(17) which reads in relevant part, "A State plan for medical assistance must . . . include reasonable standards . . . for determining eligibility for *and* the extent of medical assistance under the plan."

[19] Contrary to Judge McMillian's opinion below, Iowa thus has not introduced an additional criterion for Medicaid eligibility. *See Hayes* v. *Stanton*, 512 F.2d 133, 139 (7th Cir. 1975)(distinction between Medicaid coverage and eligibility recognized); *accord, Franssen* v. *Juras*, 406 F.Sup. 1375, 1378 (D. Ore. 1975).

No holding of this Court is to the contrary. The statement contained in the opinion in *Blum* v. *Caldwell*, ____ U.S. ____, 100 S.Ct. 1635, 1636, (Marshall, J., in chambers) (1981), that suggests that SSI eligibles receive Medicaid benefits is dicta. Similarly, observations in *Beltran* v. *Meyers*, ____ U.S. ____, 101 S.Ct. 1961, 1963, n. 1, n. 3 (1981), are only sideline observations and were not directly related to the matters in litigation.

[20] *See West* v. *Cole*, 390 F.Supp. 91, 95 (N.D. Miss. 1975) (discussion of expansion of benefits to disabled minors and raising of income levels). *See* 42 U.S.C. § 138c(a)(3) (extending benefits to disabled of all ages).

the definition of disabled individuals entitled to SSI benefits, the states would be *required* to insure that medical assistance was available to that expanded group of persons.

With respect to income and resources *eligibility* levels, Iowa fully follows the SSI criterion. As SSI eligibility levels for Medicaid assistance are altered by Congress, Iowa follows suit. If the level is increased next year, so too will Iowa's, since it is an SSI state. But Iowa, pursuant to the express delegation in 17(D), maintains that in *calculating* or *determining* whether a person meets that eligibility limit, which admittedly is entirely controlled by SSI standards, it may, if it chooses, reasonably consider spousal financial responsibility, Section 17(D).

Indeed, the distinction between eligibility standards and subsequent application of spousal financial responsibility in determining whether those standards have been met appears to have been recognized by at least one Congressional Committee. The Senate Committee Report considering adoption of the Medicaid Program contains separate subheadings entitled "Eligibility for medical assistance" and "Determination of need for medical assistance". Discussion of spousal financial responsibility falls under the latter heading. See S. Rep. No. 404, 89th Cong., 1st, (1965) *as reprinted in* 1965 U.S. Code Cong. and Admin. News at 2017-18.

Recent legislative action also tends to support proposition that Congress did not intend SSI eligibility requirements to in effect preempt state authority under Medicaid to enforce its notions of proper spousal financial responsibility. Prior to 1980, the circuits split on the question of whether SSI states could establish transfer of asset restrictions on Medicaid receipients not present in the SSI statutes. The Second and Fourth circuits struck down state transfer of asset regulations at least in part on a theory similar to that presented here, namely, that SSI states could not adopt transfer of asset regulations for Medicaid purposes more restrictive than those contained in the SSI program. See

Caldwell v. *Blum*, 621 F.2d 491 (2nd Cir. 1980), *Fabula* v. *Buck*, 598 F.2d 869 (4th Cir. 1979). When the Ninth Circuit came to the opposite conclusion, the Supreme Court granted certiorari to resolve the conflict among the circuits, *Dawson* v. *Meyers*, 622 F.2d 1304 (9th Cir. 1980), *cert. granted sub nom.*, *Beltran* v. *Meyers*, ___ U.S. ___, ___ S.Ct. ___ (1980). Before the Court could decide the question, however, Congress enacted legislation expressly disavowing the restrictive approach utilized by the Second and Fourth Circuits, Pub. L. 96-611, 94 Stat. 3567 (1980). As a result, the court did not need to reach the issue in *Beltran* v. *Meyers*, ___ U.S. ___, 101 S.Ct. 1961 (1981)(judgment vacated and remanded to the Ninth Circuit for consideration in light of the statutory change).

In contrast, a measure that would clearly restrict state spousal responsibility authority along the lines suggested by Petitioners under Medicaid has languished in the Congressional halls. A bill to accomplish this goal was introduced in 1977, but it has not made any progress. S. 1914, 95th Congress, 1st Session. The arguments presented by its sponsor, Senator Birch Bayh, were similar to those outlined in the pre *Grey Panther* court decisions which limited state authority to enforce spousal financial responsibility. See 123 Cong. Rec. S24687 (July 25, 1977).

2. Nothing In The So-Called "Deeming" Provisions Of The Supplemental Security Income Act Requires Time Restricted Medicaid Deeming.

Petitioners claim that SSI provisions require that financial responsibility only be considered for one or six months, depending upon the eligibility status of the non-institutionalized spouse.[21] That is not precise. Rather, the SSI provisions simply do not generally provide express authority for consideration of the financial responsibility of spouses or parents when they are not living with the beneficiary.

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[21] *See* Petitioner's Brief at 62.

For instance, 42 U.S.C. § 1382c(f)(1) provides:

> For purposes of determining eligibility for and the amount of benefits for any individual who is married *and whose spouse is living with him in the same household but is not an eligible spouse,* such individual's income and resources shall be deemed to include any income or resources of such spouse, whether or not available to such individual, except to the extent determined by the Secretary to be inequitable under the circumstances (emphasis supplied).

This provision does not address itself at all to the financial responsibility of spouses not living together. Rather, the provision simply states that where a spouse is living with a noneligible spouse, the applicant spouse's income and resources shall include that of the nonapplicant spouse.[22]

Plainly, this provision does not on its face *proscribe* anything, let alone reasonable state policies enforcing spousal financial responsibility of spouses not living together under Medicaid. Rather, the most that can be said is that this section does not expressly provide statutory authority for broader consideration of spousal financial resources under SSI.[23]

This is not to say that regulations of the Secretary which do not allow consideration of financial responsibility of spouses if the noninstitutionalized spouse is ineligible *under the SSI program* are necessarily unlawful. Conceivably, the Secretary may be correct on the ground that, because the statute does not expressly authorize broader consideration of financial resources,

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[22] *See* dissent of Goodwin, C. J., in *Franssen* v. *Juras,* 406 F.Supp. 1375 (D. Ore. 1975).

[23] Even Judge McMillian, in his opinion in this case which supported HEW, stated that neither the statute nor the legislative history absolutely prohibits "deeming". *See Herweg* v. *Ray,* 619 F.2d 1265, 1279 (8th Cir. 1980).

he is without authority to expand such consideration by rule. But the Medicaid statute *does* contain the express authority which allows states to consider financial responsibility of spouses and parents without any limitation as to living conditions, Section 17(D).

A similar analysis applies to 42 U.S.C. § 1396c(b), which states:

> For the purpose of this subchapter, the term "eligible spouse" means an aged, blind, or disabled individual who is the husband or wife of another aged, blind, or disabled individual *who had not been living apart from such other aged, blind, or disabled individual for more than six months* (emphasis supplied).

This is not really a provision designed to limit financial responsibility of spouses. Indeed, because by definition the other spouse under this statute is eligible for SSI benefits, too, there is no extra money available that might be considered under a state Medicaid plan designed to insure that medical assistance is available.

The purpose of the above provision is plain from the legislative history. It is an antifraud provision. Under the SSI scheme, households who contain two eligible spouses receive *less* assistance than two eligible spouses living separately. The reason for this difference is clear; two persons living together achieve economies of scale and therefore require less assistance than those living separately. Congress feared, however, that couples would temporarily split up in order to receive extra benefits. The six-month requirement was designed to insure that a real breakdown in the family unit occurred before individuals would receive increased benefits. See H.R. Rep. No. 92-231, 92d Cong., 2d Sess. 150 (1971). Because the section has nothing to do with financial responsibility of spouses at all, it is no reed

upon which to override the express terms of Sections 17(B) and (D).[34]

C. By Insisting On Exercising Its Expressly Delegated Statutory Power To Require Reasonable Spousal Financial Responsibility, Iowa Does not Evade A Congressionally Prescribed "Choice" Between Accepting Expanded SSI Coverage Or Limiting Benefits Pursuant To The So-Called 209(b) Option.

The petitioners press the argument that if Iowa wants to enforce administratively spousal responsibility for a period beyond the narrow one-month window imposed by the regulation at issue here, it has the "choice" of becoming a 209(b) state. But this artificially forced "choice" is inconsistent with the federal statutory scheme. Not only is this choice not required, it represents a rewriting of the statutes.

1. Iowa Has Made The Conscious Policy Choice, As Congress Intended, To Accept Liberalized Eligibility Requirements Under The SSI Amendments.

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[34] As the Court of Appeals noted with respect to this provision in *Grey Panthers* v. *Administrator, Health Care Finance,* 629 F.2d 180, 184 (D.C. Cir. 1980), rev'd on other grounds *sub nom., Schweiker* v. *Grey Panthers,* ____ U.S. ____, 101 S.Ct. 2633 (1980), "there is no indication that its propriety (deeming) was considered in the context of separations caused by institutionalization, where fraud is presumably not a concern." *Accord* Comment, *To Deem or Not to Deem: Evaluating and Attributing Available Spousal Income to an Institutionalized Medicaid Applicant,* 67 Va.L.Rev. 767, 779-80 (1980) (Congress established the six month deeming period solely to deter spouses from separating voluntarily in order to obtain higher benefits, a concern that does not exist when institutionalization separates a couple.) *See also* Judge Ross's observations in *Herweg* v. *Ray,* 619 F.2d 1265, 1273, n. 5 (8th Cir. 1980); *Mansfield* v. *Weinberger,* 398 F.Supp. 965, 968-69 (D.D.C. 1975).

After Congress enacted the SSI amendments in 1972, Iowa faced the question of whether to become a so-called 209(b) state, and thereby be able to freeze eligibility requirements to those in force in 1972, 42 U.S.C. § 1396a(f), or accept the liberalized eligibility requirements that necessarily followed if Iowa chose to participate as an SSI state. Responsible officials in Iowa elected the SSI option. Through this decision, Iowa policy-makers recognized the dire need to extend Medical care to disabled minors and to liberalize income and resource limitations on Medicaid eligibility in light of sky-rocketing health care costs and persistent inflation.

In so doing, however, Iowa emphatically did not wish to surrender its authority, expressly delegated to it by Sections 17(B) and 17(D) of the Social Security Act, to consider the income of a noninstitutionalized spouse when calculating whether an institutionalized applicant met the newly liberalized SSI linked income and resource requirements. While Iowa was and is prepared to accept the *substantive* eligibility changes inherent in SSI, it wishes to maintain its Congressionally sanctioned method of determining the income and resources available to an institutionalized spouse. Indeed, Iowa's ability effectively to enforce spousal financial responsibility helps the state limit unnecessary Medicaid expenditures and makes the state more able to meet its expanded burdens as an SSI-Medicaid state.

The relationship between the state's capacity to enforce administratively its policy on spousal financial responsibility and its ability to provide benefits to SSI eligibles was noted in Defendant Burns' communication with HHS officials in 1977 indicating his opposition to HHS's restrictive spousal responsibility regulation. Burns declared that if HHS were to prevail,

> the state may have to revise the state plan and revert to a program which does not accept all SSI eligibles for Medicaid Services [exercise the 209(b) option], thereby reducing the number of persons eligible for medical